Supreme Court, U.S.
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No. 87-674

In The

Supreme Court of the United States

October Term, 1987

THE MIHALEK CORPORATION
and LAWRENCE PATRICK MIHALEK,

Petitioners,

vs.

THE STATE OF MICHIGAN,
GOVERNOR JAMES J. BLANCHARD,
THE DEPARTMENT OF COMMERCE OF THE
STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR,
and ROSS ROY, INC.,

Respondents.

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT ON BEHALF OF RESPONDENT, ROSS ROY, INC.

VANDEVEER, GARZIA, TONKIN, KERR,
HEAPHY, MOORE & SILLS, P.C.
By: ROBERT D. BRIGNALL (P34308)
Attorney for Respondent Ross Roy, Inc.
Counsel of Record
333 West Fort Street, Suite 1600
Detroit, Michigan 48226
(313) 961-4880

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case contains some inaccuracies and omits every fact unfavorable to petitioners, which constitutes a considerable body of information indeed. Respondent Ross Roy, Inc. believes that all facts relevant to a disposition of this appeal may be found in an objective form in the opinion of the lower court in *Mihalek Corporation* v *State of Michigan*, 814 F 2d 290 (Ca 6, 1987).

RULE 28.1 STATEMENT

Ross Roy, Inc. has one parent:

Ross Roy Group, Inc.

Ross Roy, Inc.'s affiliates are:

Calet, Hirsch & Spector, Inc.; Di Iorio, Wergelis, Inc.; Griswold, Inc.; Gray & Kilgore, Inc.; Ross Roy of Canada, Ltd.

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case, because the Court of Appeals made its determination based upon well-established principles of copyright infringement and trademark violation law. This case, therefore, does not present this Court with any special and important reasons for granting review.

Further, the Court of Appeals was clearly correct in the result achieved. Both the trial court and the Court of Appeals conducted a careful examination of Mihalek's copyrighted material, compared that material to respondent's work product, and found no substantial similarity in the products. This finding was fatal to petitioners' claims for copyright infringement and trademark violation.

Respondent Ross Roy will address only two issues raised by petitioners — whether summary judgment was properly granted as to the copyright infringement count and whether summary judgment was properly granted as to the trademark violation count. The remaining issues relate exclusively to the governmental respondents and Ross Roy is confident that these issues will be adequately and thoroughly addressed in their response to the petition for writ of certiorari.

ARGUMENT

I.

THE WRIT SHOULD NOT BE GRANTED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

A. The Trial Court Correctly Granted Summary Judgment For Respondents On Petitioners' Copyright Claims.

Apart from simply being in the right, there is nothing more helpful to an appellate practitioner defending a lower court decision than a good lower court decision. This writer and his client are fortunate indeed to be in a position to defend the unamimous opinion of the Court of Appeals as authored by Circuit Judge Wellford.

The Court of Appeals recognized the proper standard for adjudicating a summary judgment motion in copyright cases, per *Wickham* v *Knoxville International Energy Exposition, Inc.*, 739 F 2d 1094 (Ca 6, 1984). It concisely and accurately reviewed and applied the law governing copyright protection, with particular regard to the substantial similarity requirement. Finally, it conducted a thorough examination of the exhibits viewed by the trial court, and made an independent determination that, as a matter of law, an average reasonable lay person could not find substantial or sufficient similarity to establish copyright infringement.

To demonstrate infringement, a plaintiff must establish ownership of the copyright and copying by the defendant. *Reyhner* v *Children's Television Work Shop*, 533 F 2d 87 (Ca 2, 1976). The element of copying may be demonstrated by circumstantial evidence consisting of access to the copyrighted work and substantial simi-

larities to the protectable material in the two works. *Reyhner, supra,* citing *Arnstein* v *Porter,* 154 F 2d 464 (Ca 2, 1946). In this case, the courts below conducted thorough comparative examinations of Mihalek's works and those independently created by a professional public relations firm and ultimately used by the State. Both courts found as a matter of law substantial similarity did not exist.

Although petitioners argue that summary judgment based upon absence of actionable similarity should not be freely granted, a trial court has the ability to grant such a judgment where after comparing the two works it determines "that as a matter of law a trier of fact would not be permitted to find substantial similarity." *Wickham, supra,* p 1097.

In *Reyhner* for example, the appellate court affirmed a trial court's finding that two folk stories were not substantially similar. Although both stories contained similar events, they were not similar in "mood, details or characterization." *Reyhner, supra,* p 92. Both stories therefore contained only the same idea, not the same expression of the idea, and only the latter is deserving of protection against infringement. *Reyhner, supra,* p 90, citing *Mazer* v *Stein,* 347 US 201, 217; 74 S Ct 460; 98 L Ed 630 (1954). This Court, by the way, declined to review the *Reyhner* decision at 429 US 980; 97 S Ct 492; 50 L Ed 2d 588 (1976).

In *Wickham,* the court also affirmed a grant of summary judgment based upon absence of actionable similarity. The defendant had developed a design for a building it called a sun sphere, which essentially consisted of a sphere sitting atop a tower which in turn sprung from a squat base. The plaintiff maintained that these designs infringed upon two copyrighted drawings,

both of which also featured spherical or saucer-shaped objects mounted on towers.

Both the trial court and the Court of Appeals found that the concept of a tower-mounted structure was only an "idea," which was not copyrightable. Additionally, the two courts found sufficient structural differences in the buildings to declare, as a matter of law, that no question of substantial similarity existed. See *Wickham, supra,* pp 1096-1097.

The decision of the Sixth Circuit in this case is perfectly consistent with those in *Wickham* and *Reyhner.* The court found that Mihalek's concept to use T-shirts, hats, and slogans to promote Michigan, as the State of Michigan ultimately did, was not "any indication of similarity where the individual clothing items, slogans, pictures and events were substantially different." *Mihalek Corporation* v *State of Michigan,* 814 F 2d 290, 294-295 (Ca 6, 1987). In other words, the use of these common devices in a promotional campaign was merely an idea; the expressions of the ideas, comparatively viewed by both the trial court and Court of Appeals, were obviously and substantially different.

Petitioners maintain on appeal that the trial court should not have granted summary judgment because petitioners were able to produce affidavits from "lay observers," who opined that the works were similar. The court below rejected the argument that the affidavits were relevant:

> "In this case the works, materials, and expressions of Mihalek as compared with those utilized in the state's campaign are crucial determinative, not the opinions of lay observers, who have made no careful determinations of the entire concept involved." *Mihalek Corp., supra,* p 294, citations and footnote omitted.

Indeed, there was a prohibitive possibility that the lay observers, not having been instructed in the relevant law, would not recognize what constituted unprotected "ideas" as opposed to protected expressions of ideas. The trial judge and the Judges of the Court of Appeals, of course, knew what they were looking for in making their comparative examination.

The courts below followed the law and reached a most appropriate result. There is no warrant for further review, and no opportunity for this Court to provide additional guidance to bench and bar as to the statute of applicable law.

B. The Court Of Appeals Properly Affirmed The Grant Of Summary Judgment To Respondents On The Trademark Issue.

As the courts below recognized, a common issue governed the disposition of petitioners' claims under the Federal Trademark Act, 15 USC § 1125(a). It was necessary to inquire whether the works used by the State were "likely to cause confusion to the general public as to the origin of these materials." *Mihalek Corp., supra*, p 296. The absence of substantial similarity already found necessarily eliminated the possibility of actual confusion to the general public as to who authored the works. Thus, the court below found:

> "Essentially for the reasons discussed fully on the copyright infringement claim, we find no error in the District Court's determination. After a careful examination of the materials claimed to be protected under the Lanham Act and the particulars involved in the campaigns, we find no error in the findings of the court below. There is no substantial similarity in the products, or in the 'marks utilized,' nor any

> substantial evidence of *actual confusion* based on side-by-side examination or comparison of Mihalek's work product as compared to that utilized by Defendants." *Id.*

The correctness of the lower courts' decisions on the copyright issues spills over into this issue, and further review of the grant of summary judgment on the trademark claim is therefore also unwarranted.



BEST AVAILABLE COPY

CONCLUSION

WHEREFORE, respondent Ross Roy, Inc. prays that this Honorable Court deny petitioners' application for writ of certiorari.

Respectfully submitted,

VANDEVEER, GARZIA, TONKIN, KERR, HEAPHY, MOORE & SILLS, P.C.

By: /s/ ROBERT D. BRIGNALL (P34308)
Attorney for Respondent Ross Roy, Inc.
Counsel of Record

333 West Fort Street, Suite 1600
Detroit, Michigan 48226
(313) 961-4880

Dated: November 19, 1987